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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 101

E. EDELMANN & COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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INDEX.

PAGE

A. Motion for Leave to File Petition for Rehearing.. 1

B. Petition for Rehearing of Order Denying Petition for Writ of Certiorari 2

The Reasons for Granting Rehearing and Issuing the Writ 2

Conclusion 7

Appendix 9

CITATIONS.

Bradley Mining Co. v. Boice, 345 U. S. 932..... 2

FTC v. Nichoff, 355 U. S. ....., 78 S. Ct. 377..1, 3, 5, 6, 7, 9

Moog Industries v. FTC, 355 U. S. ....., 78 S. Ct. 377 .....1, 3, 5, 6, 7, 9

Zap v. U. S., 330 U. S. 800..... 2

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MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

A. MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

E. Edelmann & Company, petitioner, respectfully moves for leave to file the annexed petition for rehearing of the Order of this Court, entered on February 3, 1958, denying the petition for writ of certiorari in this case. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of this Court, in *Moog Industries, Inc.* v. *Federal Trade Commission* and *Federal Trade Commission* v. *C. E. Niehoff & Co.*, Nos. 77 and 110, in the October Term, 1957, decided January 27, 1958, 355 U. S. ....., 78 S. Ct. 377, set forth a rule of law with which the Opinion of the Federal Trade Commission and of the Court of Appeals for the Seventh Circuit in this case are in

direct conflict, and thus there has been created a conflict of decisions between this Court and the Court of Appeals of the Seventh Circuit which requires a reversal of the Seventh Circuit's decision in this case. This petition is filed within the period of time prescribed in Rule 58 and this Court clearly has the power in its discretion to entertain the petition. *Zap* v. *U. S.*, 330 U. S. 800, and *Bradley Mining Co.* v. *Boice*, 345 U. S. 932.

W. M. Van Sciver,
Counsel for Petitioner.

February 25, 1958.

B. PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

E. Edelmann & Company, petitioner herein, prays that this Court grant rehearing of its Order of February 3, 1958 denying the petition for writ of certiorari, 355 U. S. ....., 26 The United States Law Week 3229, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the Seventh Circuit in the above entitled case as prayed for herein.

The Reasons for Granting Rehearing and Issuing the Writ.

At the time of this Court's Order of February 3, 1958, the question that had been presented to this Court in the petition for writ of certiorari filed on April 10, 1957, was substantially the same as the question presented by the petition for writ of certiorari in *Moog Industries, Inc.* v. *Federal Trade Commission*, No. 77 in the October Term 1957, and upon which this Court had granted certiorari. The Question raised by petitioner also embraced the issue for which review was being sought by a petition for writ of certiorari filed in *Federal Trade Commission* v. *C. E. Niehoff & Co.*, No. 110 in the October Term, 1957, and upon

which this Court granted certiorari. Accordingly, when this Court issued its opinion on January 27, 1958, deciding the *Moog Industries* and *Niehoff* cases, 355 U. S. ..... (reported at 78 S. Ct. 377 and printed in the Appendix herein, *infra,* pp. 9-12), it then appeared that the Question heretofore presented by petitioner was fully decided by this Court's opinion in those cases, and thereafter, on February 3, 1958, this Court properly denied the petition for writ of certiorari in this case.

The QUESTION now presented by this Petition for Rehearing is:

> Did the Hearing Examiner's ruling, sustained by the Commission and the Court of Appeals for the Seventh Circuit, denying petitioner the right to introduce evidence at the hearing—which evidence was intended to show why an order against petitioner to cease and desist from engaging in price discrimination should not go into effect before others are similarly prohibited—result in a denial to petitioner of due process of law, in view of this Court's opinion in the *Moog Industries* and *Niehoff* cases, recently decided on January 27, 1958, which opinion requires the Commission to weigh and appraise the evidence, and to decide the issue of stay of the Commission's Order, if the issue is raised by a respondent during the hearing before the Commission.

In its opinion deciding the *Moog Industries* and *Niehoff* cases, *supra,* this Court spelled out with particularity one scope of inquiry with which the Federal Trade Commission was to be concerned in this type of case, and particularly pointed out that a decision on this specific issue was "peculiarly within the expert understanding of the Commission". Specifically, this Court stated:

> "• • • *Thus the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety*

of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. *It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law.* Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically. (Emphasis ours.)

"The question, then, of whether orders such as those before us should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide." (Emphasis ours.)

In view of the foregoing statements by this Court, relating to the responsibility and duties of the Commission to decide issues which are peculiarly within the Commission's "expert understanding" and "special competence" to appraise and decide, it then becomes clearly apparent that the Hearing Examiner in the instant case erred both (a) in denying petitioner the opportunity to introduce evidence which was intended to show why an order against petitioner to cease and desist from engaging in price discrimination should not go into effect before others are similarly pro-

hibited (R. 281), and (b) in failing to appraise and decide the issue of stay of the Commission's Order.

The only issue in this petition involves the refusal by the Hearing Examiner (R. 281) to permit the introduction of evidence relating to, and the refusal by the Hearing Examiner to appraise and decide, the issue of stay of the Commission's Order, raised by petitioner during the hearing before the Commission. This action by the Hearing Examiner appears to be in direct conflict with this Court's opinion in the *Moog Industries* and *Niehoff* cases, *supra*.

The Commission, in rejecting petitioner's contention of error with respect to the exclusion of testimony relevant to the issue of stay of the Commission's Order, stated (R. 84):

> "We think this testimony was properly excluded by the hearing examiner as irrelevant and immaterial to the issues of this proceeding."

Again, the foregoing decision by the Commission appears to be in direct conflict with the law as interpreted by this Court in the *Moog Industries* and *Niehoff* cases, *supra*.

The Commission's error in affirming the Hearing Examiner's exclusion of testimony, relating to the issue of stay of the Commission's Order, was specifically designated by petitioner to the Court of Appeals for the Seventh Circuit (R. 93, Point 15(a)), but that Court, too, affirmed the Hearing Examiner's exclusion of evidence, stating:

> "We have considered the other issues raised by petitioner and have found them to be without merit."

Thus, the opinion of the Court of Appeals (reproduced in the Appendix in the Petition for Writ of Certiorari, pages i-viii), also appears to be in direct conflict with the opinion of this Court in the *Moog Industries* and *Niehoff* cases, *supra*.

The Question now called to this Court's attention by this Petition for Rehearing complies with the provisions of Rule 58 of this Court, in that it is confined to intervening circumstances of substantial or controlling effect. Furthermore, the Question raised by this Petition for Rehearing differs substantially from the situation in the *Moog Industries* case, *supra*, in that the respondent in the *Moog Industries* case had made no effort whatsoever to raise the issue of stay of the Commission's Order during the hearing before the Commission. In the *Nichoff* case however, the Hearing Examiner permitted the introduction of evidence relating to the possible death of that Company if its competitors were not required to immediately follow the pricing practices required by the cease and desist order. But the *refusal* by the Hearing Examiner, in the instant case, to permit the introduction of evidence relating to the issue of stay of the Commissioner's Order, when petitioner made every effort to introduce such evidence, has caused the petitioner herein to be deprived of due process of law, since this Court has indicated, by its opinion in the *Moog Industries* and *Nichoff* cases, *supra*, that due process of law requires the Commission to entertain evidence respecting this particular issue and to decide the issue on the evidence so presented, inasmuch as the decision of such issue is "peculiarly within the expert understanding of the Commission".

CONCLUSION.

It is, therefore, submitted that the error of the Court of Appeals for the Seventh Circuit, in failing to reverse the Commission's sustaining of the Hearing Examiner's denial of the right to petitioner to introduce the evidence offered, resulted in a denial of due process to petitioner, wherefore this Petition for Rehearing should be granted for the purpose of this Court entering an Order remanding the case to the Court of Appeals with instructions to it and to the Federal Trade Commission to proceed in accordance with this Court's opinion in the *Moog Industries* and *Niehoff* cases, *supra*.

Respectfully submitted,

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Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

W. M. VAN SCIVER.
Counsel for Petitioner.

February 25, 1958.

APPENDIX.

UNITED STATES SUPREME COURT.

355 U. S. ....., 78 S. Ct. 377.

MOOG INDUSTRIES, INC, *Petitioner,*

vs.

FEDERAL TRADE COMMISSION.

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

C. E. NIEHOFF & CO.

Nos. 77 and 110.

Argued Jan. 14, 1958.

Decided Jan. 27, 1958.

Per Curiam.

[1] The general question presented by these two cases is whether it is within the scope of the reviewing authority of a Court of Appeals to postpone the operation of a valid cease and desist order of the Federal Trade Commission against a single firm until similar orders have been entered against that firm's competitors. In proceedings arising out of alleged violations of the price discrimination provisions of the Clayton Act, § 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13, 15 U. S. C. A. § 13, two Courts of Appeals reached opposed results on this underlying issue. In order to resolve the conflict we granted certiorari, 353 U. S. 908, 77 S. Ct. 665, 1 L. Ed. 2d 662; 353 U. S. 982, 77 S. Ct. 1284, 1 L. Ed. 2d 1141.

In No. 77, petitioner (Moog Industries, Inc.) was found by the Commission to have violated the Act and was ordered to cease and desist from further violation. 51 F. T. C. 931. Petitioner sought review in the United States Court of Appeals for the Eighth Circuit. Upon affirmance of the order, 238 F. 2d 43, petitioner moved the court to hold the entry of judgment in abeyance on the ground that petitioner would suffer serious financial loss if prohibited from engaging in pricing practices open to its competitors. The court denied the requested relief.

In No. 110, respondent (C. E. Niehoff & Co.) requested the Commission to hold in abeyance the cease and desist order that had been recommended by the hearing examiner, on the ground that respondent would have to go out of business if compelled to sell at a uniform price while its competitors were not under similar restraint. The Commission found that respondent had violated the Act and, in issuing its order, denied respondent's request. 51 F. T. C. 1114, 1153. On review in the United States Court of Appeals for the Seventh Circuit, the Commission's determination of statutory violation was affirmed; however, the court (one judge dissenting) directed that the cease and desist order should take effect "at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." 241 F. 2d 37, 43.

[2-5] In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimi-

nation should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

[6, 7] The question, then, of whether orders such as those before us should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide. If the question has not been raised before the Commission, as was the situation in No. 77, a reviewing court should not in any event entertain it. If the Commission has decided the question, its discretionary determination should not be over-turned in the absence of a patent abuse of discretion. Accordingly, the judgment in No. 77 is affirmed, and the judgment in No. 110 is vacated and the

cause remanded to the Court of Appeals with directions to affirm the order of the Commission in its entirety.

It is so ordered.

Judgment in No. 77 affirmed and judgment in No. 110, vacated and cause remanded with directions.

Mr. Justice WHITTAKER took no part in the consideration or decision of these cases.